IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0441

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOSHUA DON LARSON,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, The Honorable John W. Larson, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
EILEEN A. LARKIN
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

FRED R. VAN VALKENBURG
Missoula County Attorney
200 West Broadway
Missoula, MT 59802

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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ISSUES PRESENTED

1. Did the district court err by denying Appellant's Motion to Dismiss for lack of competent corroborating evidence he was driving while impaired by marijuana?

2. Did the district court err by denying Appellant's Motion to Suppress after the jury had been impaneled and was returning to hear opening statements?

3. Did the district court err by refusing Appellant's complete jury instruction that a conviction cannot be based upon refusal of a blood test alone?

STATEMENT OF THE CASE

The police stopped Joshua Larson (Larson) for having large tires and no mud flaps on September 21, 2008. They detained him for forty-plus minutes on the roadside, where he provided a Preliminary Breath Test (PBT) of .023. After a two-hour detention, Larson was finally *Mirandized* and charged with Driving Under the Influence (DUI)-Drugs, in violation of Mont. Code Ann. § 61-1-401. (App. A.) He was convicted in Missoula Justice Court of Driving a Motor Vehicle Under the Influence of Alcohol or Drugs, First Offense, in violation of Mont. Code. Ann. § 61-8-401(1)(a), on February 20, 2009. He appealed to the district court for a trial *de novo*. (D.C. Doc. 1.)

On April 23, 2009, Larson filed several pretrial motions (to dismiss, to suppress, and *in limine*) and requested a hearing. Larson moved to dismiss because

the State was unable to present competent corroborative evidence of impairment, thus unlawfully subjecting him to conviction for refusing a blood test. (D.C. Doc. 11.)

Larson moved to suppress based on lack of particularized suspicion for (1) the stop, (2) administration of field sobriety tests (FSTs), and (3) continued detention after he provided a .023 PBT. The police subjected Larson to custodial interrogation without a *Miranda* warning, illegally detained him, failed to advise him of his right of refusal when they told him they needed to search his truck, and lacked probable cause to arrest him. (D.C. Doc. 12.) Larson moved to suppress and exclude any statements or evidence related to marijuana. (D.C. Doc. 10.)

At Larson's request, an evidentiary hearing on his motions was set for May 4, 2009, and then postponed at the State's request. (App. B.) The parties agreed to continue the May 11, 2009 trial date. (App. B.)

Instead, the district court denied the motion to dismiss on May 7, 2009 and impaneled a jury on May 8, 2009, three days before a hearing on Larson's motions *in limine* and to suppress. (D.C. Doc. 28; 5/8/09 Tr. at 1-81.) The evidentiary hearing was held the first day of trial and concluded as the jury entered for opening statements. (5/11/09 Tr. (Tr.) at 85-201.) The court denied the motions by written order the same day. (D.C. Docs. 32, 33.)

Over Larson's objection, two deputies opined to the jury that Larson had driven while impaired by marijuana. No expert testimony on marijuana impairment was offered by the State or required by the court. The jury convicted Larson on May 12, 2009. (5/12/09 Tr. at 392-94, D.C. Doc. 39.) Judgment was entered on June 10, 2009. (D.C. Doc. 41; App. F.) Larson timely appealed to this Court.

STATEMENT OF FACTS

The State called two witnesses in both the evidentiary hearing and at trial: Deputy Scott King (King) and Deputy Gordon Schmill (Schmill) of the Missoula County Sheriff's Office (MCSO). King, who stopped Larson, had three years experience with MCSO. His sole training on DUI detection and driving while impaired was obtained in a slice of his three-month basic training at the law enforcement academy. (Tr. at 94-95.) At the time he stopped Larson, King had never made a DUI-drug arrest. (Tr. at 97.) Like King, Schmill's DUI training was limited to basic academy training. Schmill attended a one-day class on drugs taught by officers who were not certified as Drug Recognition Experts (DRE).[1]

[1] The Los Angeles Police Department (LAPD) and the National Highway Traffic Safety Administration (NHTSA) collaborated to develop a DRE protocol. DRE Standards accept a 75% toxicological confirmation rate of suspected drug use for certification. http://www.decp.org/faq.htm (Feb. 25, 2010) (App. D at 2.)

http://www.decp.org/about/ (Feb. 25, 2010) (App. C) (Tr. at 152-53). Missoula County does not employ DREs. (Tr. at 110.)

Around midnight on rainy September 21, 2008, King was backing Schmill at a traffic stop in Missoula. (Tr. at 97.) King heard an "engine revving, tires squealing." (Tr. at 98.) He looked up to see a blue Ford Ranger revving its engine and squealing its tires through an intersection. (Tr. at 98.) Schmill completed the traffic stop in progress. King left to investigate the squealing tires. Farther down Reserve Street, on South Avenue, King pulled behind Larson's blue Ford Ranger truck. King followed Larson but did not activate his overhead lights until he noticed the truck had large tires and no mud flaps, at South Avenue and Tower Street. (Tr. at 99.) There is a video, but no audio of King's forty-plus minute roadside detention of Larson, because "[i]t's just the way we've always done it." (Ex. C-3; Tr. at 110.)

The video clearly shows rainy conditions and shows Larson driving appropriately within his lane. In response to King's overhead lights, Larson signaled a right turn off South, turning a little wide before stopping safely on the shoulder of Tower. (Tr. at 99.) Even before he approached the truck, King had formed the opinion that Larson's acts of putting on his turn signal and turning off the busy, two-lane thoroughfare of South to stop safely on the shoulder of the quiet side street of Tower was indicative of a slow response time. "[H]e was just slow in

reacting to what I--to me turning my lights on and trying to get to the side of the road." (Tr. at 108.) King testified: "And most of the time when I activate my lights, people pull to the side of the road. They don't always pull down a side street to get out which kind of threw me." (Tr. at 109.) Having been thrown by Larson's turn off South, and absent any pre-stop observation of erratic driving, King approached Larson's truck with the predetermination that he had "more than a careless driver." (Tr. at 101, 108, 264-65.)

King asked Larson "if there was a reason for spinning his tires at the intersection." Larson explained "it was slick out." (Inclusive Case Rpt. (Sept. 22, 2008) (App. E).) King smelled no alcohol or marijuana about Larson or the vehicle, and observed no glassy, bloodshot eyes or fumbling when he interacted with Larson. (Tr. at 118-19, 254; App. E.) King asked for Larson's license, proof of insurance, and registration, as well as the identification of his passengers. (Tr. at 99.) King testified Larson's "reaction to what I was asking him for was slow." (Tr. at 100.)

King's preconceived, subjective view of Larson's allegedly slow response is contradicted by the video time stamps. It took just one minute and thirty seconds (from time stamp 1:13-2:45) for King to approach Larson's truck, obtain identification and documentation from several individuals and return to his patrol

car. It took another three minutes for King to verify there were no "wants and warrants." (Tr. at 100; St. Ex. C-3 at 2:51-5:19.)

King returned to Larson's truck, joined by the more experienced Schmill, who had just arrived. Schmill approached the passenger side of the vehicle at time stamp 5:19, shined his flashlight inside, and remained there until time stamp 6:28. (St. Ex. C-3 at 5:19-6:28.)

Without having smelled alcohol, observed glassy or bloodshot eyes, or observed erratic driving, King asked Larson if he "had anything to drink today." (Tr. at 100.) Larson said he had a beer earlier in the day, which, for King, was enough to search Larson through FSTs. (Tr. at 101.) King administered the Horizontal Gaze Nystagmus (HGN). (Tr. at 101.) The court properly excluded the HGN results due to the State's lack of expert testimony and the State's pre-trial concession "that we are heading down more of the marijuana path." (Tr. at 179.)

Larson, an obviously tall, lanky, slow-moving, and slow-talking young man, told King he had knee and ankle problems. (Tr. at 125.) King did not choose FSTs, such as reciting the alphabet or counting tasks, to accommodate Larson's knee and ankle condition. King offered some kind of demonstration, but not on the imaginary line he instructed Larson to use. King's demonstration and Larson's FST performance cannot be reviewed because King positioned the patrol car video so that Larson's lower legs and feet cannot be seen. (St. Ex. C-3.)

Having required Larson to perform the walk-and-turn on an imaginary line on a dark, rainy night on a wet pavement, King "was convinced" Larson was impaired due to alcohol. Based on his academy training, King knew that neither HGN nor FST testing provided indicators of marijuana impairment. Despite this, King "was convinced" Larson was impaired due to alcohol after Larson, with problematic knee and ankle, performed the walk-and-turn on an imaginary line on a dark, rainy night on a wet pavement. (Tr. at 120, 122-24.)

King asked for a PBT. (Tr. at 101-02, 108.) King anticipated Larson's PBT reading would be .1 or more. (Tr. at 102.) Larson blew a .023, which King understood to mean Larson was "well under the legal limit of alcohol and that is a --how do I put it? A slight--or not much of a chance that it would be impairing his ability to drive." (Tr. at 122.) Larson had been detained for over twenty minutes by now and he was still not free to leave. (St. Ex. C-3; Tr. at 126.)

In spite of the .023 PBT, and without advising Larson of his *Miranda* rights, King continued to detain him to ask incriminating questions, such as: "Do you have any marijuana, cocaine, heroin, meth?" (Tr. at 126-27.) King told Larson he needed to search the truck. King assumed there were drugs in the vehicle. (Tr. at 103.) King testified he did not "get a chance" to inform Larson of his rights relative to the "need" to search. (Tr. at 129-30.) King testified he was getting the Consent to Search form out when Larson "just kind of turned and retrieved it

[marijuana and a cold pipe] out of his vehicle." (Tr. at 104, 130.) Likewise, Schmill testified there was no time to advise Larson of his rights.

> Q: And so it's your testimony that during that entire time that you're explaining this to him you could not - - you didn't have time to explain to him that he had the right to consult an attorney, he had the right to refuse consent to search, and that consenting to search would waive his right against unreasonable searches and seizures. You couldn't fit that in?
>
> A: Nope.

(Tr. at 171.)

Schmill testified Larson walked back to his vehicle "within a second" of the request to search his truck. (Tr. at 300.) The soundless video, with its time stamps, shows otherwise. (St. Ex. C-3.)

For several minutes following the PBT, Larson is viewed in the middle of the video screen, standing in front of the patrol car, with a deputy close to him on either side, and his truck parked some distance ahead. (St. Ex. C-3.) The deputy on Larson's right is seen in full view. The deputy on Larson's left is only partially seen, but Larson is clearly looking at him and responding to him. Larson is observed talking, responding, and shaking his head "no." The deputy on Larson's right continues talking, and is obviously making strong points by emphasizing each one on his fingers as they are pointed at Larson. After shaking his head "no" again, Larson starts to turn--after almost three minutes of inaudible questions, statements, and demands by the officers. (St. Ex. C-3, 22:30-25:12.)

Neither deputy is observed talking, motioning, directing, or commanding Larson to remain in place at the patrol car so he can be advised of his rights and his signature can be obtained on a Consent to Search form. Neither is observed with any paperwork in hand. Both deputies wordlessly follow Larson to his truck. One takes up a position on the driver's side; the other on the passenger side. Each repositions for a better view. At time stamp 25:48, almost four minutes after his .023 PBT, Larson pulled something from his truck and gave it to the deputy before all three returned to the patrol car. (St. Ex. C-3.)

King called his sergeant. After three years on the force, this was his first DUI-drugs and he shared it with his superior: "Kind of let him know what was going on and just asked--basically make sure I was following the right steps because this was my first time that I had done this." (Tr. at 105.)

About fifteen minutes later, at time stamp 40:59, Larson is observed putting his hands behind his back in position to be handcuffed. Larson endured a forty-plus minute roadside detention without having been advised of either his *Miranda* rights or his rights relative to the deputies' "need" to search his truck. (St. Ex. C-3.)

Larson was transported to the detention center where he performed FSTs again. Larson's FSTs improved in the controlled climate of the detention center and on its dry floor with a marked, not imaginary line. King read the Implied

Consent Advisory Form. Larson asked questions to understand why he needed to submit to a blood test and what would happen if he refused it. (St. Ex. C-1.) At approximately time stamp 2:05, King told Larson he was "getting charged either way" and he would "get to fight it either way." (St. Ex. C-1.) King asked Larson if he was going to refuse, and Larson nodded his head.

At time stamp 2:33, King started the detention center recording equipment again. King advised Larson of his *Miranda* rights for the first time. (St. Ex. C-2; App. E at 5.) Larson had been seized for two hours.

King filled out an Inclusive Case Report contemporaneous to Larson's arrest. (App. E.) Schmill did not. King's case report makes no mention of observing Larson with bloodshot, glassy eyes, or smelling marijuana about Larson's person or vehicle. King's report does not mention or reference that Schmill made any observations or reported any such observations to him.

Eight months later, and just days after Larson filed his motions to suppress, dismiss, and *in limine*, the more experienced Schmill testified he could recall smelling marijuana when he approached the passenger side of the truck. (Tr. at 158, 161, 299, 306.) King stopped Larson and interacted with him long before Schmill arrived. (St. Ex. C-3.) Schmill could not recall whether he smelled dry or burnt marijuana. (Tr. at 306-07.) Schmill further recalled that eight months prior, he had observed Larson with bloodshot and glassy eyes during the time King was

talking with his superior--approximately thirty minutes after Larson was initially stopped. (Tr. at 299.) The soundless roadside video contradicts Schmill's memory and testimony.

Larson is seen in front of the patrol car while King is speaking with his superior. (St. Ex. C-3.) Schmill is not observed within the video frame or anywhere near Larson during that time period. (St. Ex. C-3.) Furthermore, the less experienced King, who was first on scene, contradicted Schmill's memory and recall. King was clear: there was no smell of marijuana, no bloodshot or glassy eyes. (Tr. at 256-57, 306.)

SUMMARY OF THE ARGUMENT

The State failed to present competent corroborative evidence Larson drove while impaired by marijuana. He was convicted on the basis of non-expert opinion testimony from two deputies, who lacked particularized suspicion to justify an investigatory stop of Larson, conduct an FST search, or continue detaining him after his .023 PBT. The two-hour length of the detention (including forty-plus minutes roadside) exceeded the brevity requirement, and subjected Larson to *de facto* custody and interrogation without being advised of his constitutional rights. The jury was not appropriately instructed. The *Michaud* safeguard failed Larson. The court erred in ruling otherwise.

STANDARD OF REVIEW

The grant or denial of a motion to dismiss in a criminal case is a question of law subject to *de novo* review. *State v. Snell*, 2004 MT 334, ¶ 18, 324 Mont. 173, 103 P.3d 503, *citing State v. Weldele*, 2003 MT 117, ¶ 13, 315 Mont. 452, 69 P.3d 1162. An evidentiary ruling is reviewed for an abuse of discretion. *State v. Nobach*, 2002 MT 91, ¶ 13, 309 Mont. 342, 46 P.3d 618 (citation omitted).

A district court's denial of a motion to suppress is reviewed "to determine whether its findings of fact are clearly erroneous and whether those findings were correctly applied as a matter of law." *State v. Lafferty*, 1998 MT 247, ¶ 10, 291 Mont. 157, 967 P.2d 363 (citation omitted). "To determine whether a finding of fact is clearly erroneous, this Court ascertains whether the finding is supported by substantial evidence, whether the district court misapprehended the effect of the evidence, and whether the Court is nevertheless left with a definite and firm conviction that the district court made a mistake." *State v. Martinez*, 2003 MT 65, ¶ 19, 314 Mont. 434, 67 P.3d 207 (citation omitted).

District courts have broad discretion to formulate jury instructions, but it is "ultimately restricted by the overriding principle that jury instructions must fully and fairly instruct the jury regarding the applicable law." *State v. Miller*, 2008 MT 106, ¶ 11, 342 Mont. 355, 181 P.3d 625, *citing State v. Archambault*, 2007 MT 26,

¶ 25, 336 Mont. 6, 152 P.3d 698; *State v. Michaud*, 2008 MT 88, ¶ 16, 342 Mont. 244, 180 P.3d 636.

ARGUMENT

Larson's pretrial motions were converted to objections and preserved.

> COURT: I'm not trying to have you withdraw your motions. You get to keep all of your objections that you made.

(Tr. at 189.)

I. THE DISTRICT COURT ERRED BY DENYING LARSON'S MOTION TO DISMISS FOR LACK OF COMPETENT CORROBORATING EVIDENCE OF DRIVING WHILE IMPAIRED BY MARIJUANA.

Larson moved to dismiss on the grounds the State could not rely solely on the inference from his blood test refusal to convict him of driving under the influence. "Under the influence" means that as a result of taking alcohol and/or drugs into the body, a person's ability to safely operate a motor vehicle has been diminished. Mont. Code Ann. § 61-8-401(3)(a). Larson asserted the State could not present other competent corroborating evidence at trial as required by *Michaud* (holding that an individual cannot be convicted of DUI based on the inference derived from refusal in Mont. Code Ann. § 61-8-404(2) alone; other competent corroborating evidence of DUI must be presented).

Larson argued pretrial, and during trial, the State lacked competent corroborating evidence he was driving while impaired, putting him in danger of

conviction as a result of the statutory inference for refusing a blood test. (D.C. Doc. 11; Tr. at 186-89, 193-96; 5/12/09 Tr. at 324-25.)

The court denied Larson's motion, ruling the State's competent corroborative evidence consisted of three categories involving King's testimony: (1) he heard a loud engine and squealing tires; (2) he believed Larson talked slowly and slurred his words; and (3) based on his scoring of the FSTs and the .023 PBT result, he believed Larson was under the influence of a drug. (D.C. Doc. 28.) The court stated: "Before trial began I indicated to counsel that this trial was not going to be about experts. It was going to be about the observations of two officers . . . ." (Tr. at 268.)

A. The District Court Abused its Discretion by Allowing Two Deputies to Opine Larson was Driving While Impaired by Marijuana.

The requirement to establish competent corroborative evidence of DUI, in addition to evidence to support probable cause to arrest "safeguards against the possibility that a defendant could be convicted of driving under the influence of alcohol based solely upon the defendant's refusal to take the [breath or blood] test." *Michaud*, ¶ 49, *citing City of Great Falls v. Morris*, 2006 MT 93, ¶ 21, 332 Mont. 85, 134 P.3d 692. This Court has held that expert testimony, based on adequate foundation under Mont. R. Evid. 702, is required before an opinion related to DUI-drugs may be offered. *Nobach*, ¶ 22.

Unlike intoxication due to alcohol, lay people are not "sufficiently knowledgeable about common symptoms of drug consumption, much less the effects of drug consumption on a person's ability to drive a motor vehicle safely, to offer lay opinion testimony on those subjects, based on personal observations, under Rule 701." *Nobach*, ¶ 17. Testimony that an individual's ability to drive safely was diminished due to consumption of drugs requires expert testimony supported by adequate foundation under Mont. R. Evid. 702. *Nobach*, ¶ 22. To establish a witness's qualifications as an expert, "Rule 702 implicitly requires a foundation showing that the expert has special training or education and adequate knowledge on which to base an opinion." *State v. Russette*, 2002 MT 200, ¶ 11, 311 Mont. 188, 53 P.3d 1256 (citation omitted).

The State offered the deputies' opinion testimony regarding Larson's alleged impairment due to marijuana under Mont. R. Evid. 701. (Tr. at 88-89.) Larson objected on the grounds that marijuana intoxication/impairment testimony is not admissible under Mont. R. Evid. 701. (Tr. at 88-89.) The court determined prior to Larson's trial that there would be no expert testimony. (Tr. at 268.) Having determined that neither King nor Schmill were experts, the court nonetheless allowed them, based solely on their training and experience, to offer the jury their expert opinion on the ultimate issue. The subjects of training and experience are

subjects which generally relate to expert opinion testimony under Mont. R. Evid. 702. *Nobach*, ¶ 17.

King opined on the ultimate issue before the jury in his first DUI-drug arrest.

> Q: So based on all of those observations during your interaction with the defendant, do you have an opinion as to whether he was impaired?
>
> A: I do.
>
> Q: And what is that opinion?
>
> A: That he was impaired by marijuana.

(Tr. at 246.)

Schmill was likewise allowed to opine on the ultimate issue over Larson's objection.

> Q: And based on your observations that night and the observations that Deputy King told you he made, putting all the pieces of the puzzle together that night, did you feel that the defendant was impaired by marijuana?
>
> A: I do.

(Tr. at 318.)

In *Nobach*, it was an abuse of discretion to allow a highway patrol officer to testify a defendant's ability to drive was impaired by drugs. *Nobach*, ¶ 26. Similarly, and over the defense objection, the court erred by allowing King and Schmill, who were undisputedly not experts on this topic, to opine Larson was driving while impaired by marijuana.

Neither King nor Schmill were qualified under Mont. R. Evid. 702 to offer an opinion that Larson was driving while impaired by marijuana. The district court abused its discretion by allowing this testimony.

B. The District Court Must be Reversed; Larson was Prejudiced by the Tainted Evidence.

A court's error in admitting expert testimony without a proper foundation under Mont. R. Evid. 702 is trial error, subject to review for prejudice. *Nobach*, ¶ 28, *citing* Mont. Code Ann. § 46-20-701(1); *State v. Van Kirk*, 2001 MT 184, ¶ 40, 306 Mont. 215, 32 P.3d 735. This Court reviews trial error to determine "whether the finder of fact was presented with admissible evidence which proved the same facts as did the tainted evidence, and if so, whether the tainted evidence would have contributed to the conviction by comparison." *Nobach*, ¶ 28, *citing Van Kirk*, ¶ 47. Here, Larson was prejudiced because there was no other evidence he was driving while impaired by marijuana beyond the deputies' tainted, non-expert opinions.

In *Nobach*, the error was harmless because the State's expert witness, a pharmacist, testified "in great detail and with greater clarity" than the law enforcement officer. *Nobach*, ¶¶ 30-31. The State presented no such additional detailed, clarifying expert testimony here. The State's only two witnesses presented were King and Schmill. The State had no expert, a fact recognized by the district court before trial. The court explained outside the jury's presence:

"I'm just not getting into the DRE, drug recognition evaluation, area because we've got no one really to talk about it in this case. If we're going to have experts in that area, then I think it's fair you get into that area, but they're not here." (Tr. at 271.)

Larson was not only prejudiced by King and Schmill's opinion testimony, he was further prejudiced when Schmill was allowed to inflate his drug recognition expertise. Over objection, Schmill testified he had an eight-hour DRE drug training, unfairly casting himself as having expertise to recognize and identify drug impairment. (Tr. at 268-69.) This Court has recognized that a jury is likely to accord more weight to evidence presented in a scientific manner. *Michaud*, ¶ 40, *citing State v. Crawford*, 2003 MT 118, ¶ 18, 315 Mont. 480, 68 P.3d 848, *Snell*, ¶ 43; *See also Weldele*, ¶ 55.

Larson was additionally prejudiced when the court precluded Larson from cross-examining Schmill regarding the full range of DRE testing protocol, which Schmill had clearly not fulfilled. (Tr. at 268.) The DRE training program is a rigorous program with specific protocols that must be followed. (App. D.) Even when DRE's rigorous standards are followed, an officer's suspicions are confirmed by toxicology studies 75% of the time. (App. D at 2.) In contrast, a 25% error rate establishes reasonable doubt whether a fully trained DRE can accurately recognize impairment due to a specific drug.

Schmill was allowed to testify regarding his alleged training as a "Drug Recognition Expert," thus presenting his lay opinion to the jury in a scientific manner to be accorded more weight. *Michaud*, ¶ 40. The jury was led to believe Schmill had scientific expertise in recognizing drug impairment, well beyond that of a patrol officer, which he simply did not have.

Larson was prejudiced by the admission of the two deputies' opinions that he was driving while impaired by marijuana. The issue is not whether Larson was in possession of, or had smoked marijuana. The State did not prosecute Larson on either of these grounds, based on Missoula County's passage of Initiative 2, which directs law enforcement and prosecution services to give the lowest priority to adult marijuana issues. (Tr. at 90.) The issue is whether the State met its burden to prove Larson was driving while *impaired* by marijuana. No other testimony proved the same facts as King and Schmill's tainted opinion testimony.

The deputies are not experts in determining whether someone is driving while impaired by marijuana. (Tr. at 191.) The court stated: ". . . I just want to make it clear that I don't see any reason why any reference to any expert should come up because there's no experts testifying." (Tr. at 191.) Yet the court allowed the non-expert deputies to opine Larson was driving while impaired by marijuana. For King and Schmill to opine otherwise would have been an admission they violated Larson's constitutional rights by detaining him without a particularized

suspicion to do so and arrested him without probable cause. The deputies' opinions were provided to the jury not only under the authoritative guise of law enforcement, but also in a scientific manner that is accorded more weight by jurors. The State had no expert to testify Larson was impaired by marijuana on September 21, 2008 as required by *Nobach*.

There is no competent corroborating evidence that Larson was driving while impaired, either by alcohol or by marijuana. No other evidence was admitted to prove Larson was driving while impaired by marijuana. The taint of the deputies' opinion testimony cannot be cured. The tainted evidence prejudiced Larson; the district court abused its discretion and must be reversed.

II. IN THE RUSH TO HOLD THE PRETRIAL MOTIONS HEARING BEFORE THE IMPANELED JURY RETURNED, THE DISTRICT COURT ERRED BY DENYING LARSON'S MOTION TO SUPPRESS.

A. The District Court Misapprehended the Evidence; There Was a Lack Of Particularized Suspicion to Justify the Investigatory Stop.

The court heard and denied Larson's suppression motion three days after the jury had been impaneled. (D.C. Doc. 33.)

The denial of a suppression motion is reviewed on the basis of its findings of fact. *Lafferty*, ¶ 10. The court did not enter specific findings of fact when it denied Larson's suppression motion asserting there was a lack of particularized suspicion for the stop. In the body of the order, the court (1) misapprehended King observed

Larson driving carelessly, (2) failed to find Larson's tires were oversized or required mud flaps, and (3) misapprehended King observed Larson make a wide turn into oncoming traffic before the stop was initiated. (D.C. Doc. 33.)

"Whenever a police officer restrains a person's freedom, such as in a brief investigatory stop of a vehicle, the officer has seized that person." *Martinez*, ¶ 20, *citing State v. Reynolds*, 272 Mont. 46, 49, 899 P.2d 540, 542 (1995); *Terry v. Ohio*, 392 U.S. 1, 16 (1968); *United States v. Cortez*, 449 U.S. 411, 417 (1981). The Fourth Amendment to the United States Constitution and Article II, Sections 10 and 11 of the Montana Constitution protect individuals from unreasonable searches and seizures. Based on these constitutional protections, Mont. Code Ann. § 46-5-401(1) requires that in order to conduct an investigatory stop, an officer must have "a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense."

"[T]o prove the existence of particularized suspicion, the State must show: (1) objective data from which an experienced police officer can make certain inferences; and (2) a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing or was a witness to criminal activity." *Martinez*, ¶ 22, *citing State v. Gopher*, 193 Mont. 189, 194, 631 P.2d 293, 296 (1981). A court looks at the facts and the totality of circumstances when analyzing particularized suspicion. "In evaluating the totality of circumstances, a court

should consider the quantity, or content, and quality, or degree of reliability, of the information available to the officer." *Martinez*, ¶ 23 (citations omitted).

The court denied Larson's suppression motion on the erroneous belief he had been observed driving carelessly, screeching and spinning his tires, in a truck with oversized tires and no mud flaps, and observed making a wide turn into oncoming traffic. (D.C. Doc. 33.) The court misapprehended the evidence.

First, King did not observe Larson driving carelessly. He "heard a loud engine and screeching tires" on a wet pavement on a rainy night. (App. E at 3.) Hearing screeching tires and a revving engine does not justify an investigative stop. *Grinde v. State*, 249 Mont. 77, 79-80, 813 P.2d 473, 475 (1991), *overruled on other grounds by Bush v. Montana Dept. of Justice*, 1998 MT 270, 291 Mont. 359, 968 P.2d 716. King followed Larson on South Avenue, and there is no evidence he observed Larson driving there in anything but a safe, prudent manner, within his own lane, and at a safe speed before he initiated the stop. (St. Ex. C-3.)

Next, King's observation the truck had oversized tires and no mud flaps was not found to justify a stop. It is not necessary to identify a particular statutory violation to justify a stop. *State v. Schulke*, 2005 MT 77, ¶ 18, 326 Mont. 390, 109 P.3d 744 (citation omitted). However, no evidence was presented that King had a reasonable suspicion that Larson's tires were large and required mud flaps, nor did the court make a finding this suspicion justified the stop.

Finally, the court misapprehended that before the stop, King had observed Larson make a wide turn into oncoming traffic. After King activated his overhead lights and initiated the stop, Larson put on his turn signal and made a wide, right turn off South on to Tower, where there was no traffic, and stopped on the shoulder. (St. Ex. C-3.) Larson's wide, right turn cannot be included in the totality of circumstances to justify the stop. The wide turn was not made into oncoming traffic as the district court believed, and did not occur until after King activated his lights, when Larson had already been seized. *See State v. Graham*, 2007 MT 358, ¶ 16, 340 Mont. 366, 175 P.3d 885. Further, Larson's decision to safely move off a narrow thoroughfare upon seeing police lights behind him is a prudent, not careless driving decision. (Tr. at 109.)

The court misapprehended the evidence, and erred when it determined there was particularized suspicion for the stop.

B. The District Court Misapprehended the Evidence; There Was a Lack of Particularized Suspicion to Search Larson Through Field Sobriety Tests.

If, *arguendo*, King had a particularized suspicion to justify the stop, he lacked a particularized suspicion to question Larson about alcohol and conduct an FST search. The court misapprehended the evidence when it stated: (1) ". . . Defendant slurred his words, talked slowly, and moved slowly to retrieve requested license, proof of registration and insurance," and (2) "Shortly after the stop,

Defendant also volunteered the information that he had been drinking alcohol during the day." (D.C. Doc. 33.)

FSTs constitute a search under the Fourth Amendment of the United States Constitution and under Article II, Section 11 of the Montana Constitution "because an individual's constitutionally protected privacy interests are implicated in both the process of conducting the field sobriety tests and in the information disclosed." *Hulse v. State*, 1998 MT 108, ¶ 33, 289 Mont. 1, 961 P.2d 75 (citation omitted). While Montana has a compelling state interest to remove drunk drivers from the road, "the State may not invade an individual's privacy unless the procedural safeguards attached to the right to be free from unreasonable searches and seizures are met." *Hulse*, ¶ 34 (citation omitted).

This procedural safeguard is met when FSTs are supported by particularized suspicion, "providing the basis for the initial stop was of the nature that would lead an officer to believe that the driver was intoxicated," or the stop has an escalating quality to justify the FSTs. *Hulse*, ¶¶ 39-40. Continuing police intrusion is not justified after a stop's limited purpose has been accomplished. *Martinez*, ¶¶ 27, 29.

Larson was stopped for squealing tires, revving engine, large tires, and no mud flaps. None of these could reasonably lead an officer to believe Larson was intoxicated. *See Bramble v. State*, 1999 MT 132, ¶ 24, 294 Mont. 501, 982 P.2d 464 (speeding and "over and back" movement over the centerline failed to

establish particularized suspicion for FSTs). Similarly, the initial basis for stopping Larson (oversized tires/no mud flaps) cannot support a finding there was particularized suspicion to justify the continuing intrusion of an FST search. Larson's one wide turn after the stop was initiated is insufficient to establish particularized suspicion for FSTs. *Bramble*, ¶ 24. The court did not undertake an analysis or hold that Larson's stop had an escalating quality to it that justified an FST search. (D.C. Doc. 33.)

Larson's slow and allegedly slurred speech, without more (smell of alcohol, bloodshot and glassy eyes, etc.) cannot, by itself, support particularized suspicion to justify FSTs. Sober, law abiding citizens from many parts of this country engage in a slow and even slurred speaking dialect, and many of them may be found as transplants in a college town such as Missoula. Without an audio component to the roadside video, it is likely King's preconceived, pre-stop conclusion he had "more than a careless driver" interfered with, and perhaps tainted his perceptions.

Furthermore, King's testimony that Larson was slow to retrieve his license, registration, and proof of insurance is not supported by the video time stamps on the video. It took approximately one minute and thirty seconds (from time stamp 1:13 through 2:45) for King to approach Larson's truck, introduce himself, explain the reason for the stop, request documentation for Larson and his two passengers,

obtain all of it, drop some of it, retrieve it from the ground, and return to his patrol car. (St. Ex. C-3.) The video time stamps objectively show Larson was not slow to retrieve the requested documents.

Finally, the court erred in its belief that Larson "volunteered the information he had been drinking during the day." (D.C. Doc. 33.) Larson answered a direct question asked by King while he was seized: whether he had anything to drink that day. *See Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984), *citing Delaware v. Prouse*, 440 U.S. 648, 653 (1979) ("stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the Fourth] Amendmen[t]"). A full and fair review of the record establishes a lack of articulated, objective facts such as erratic driving, crossing center and fog lines, driving all over the road, weaving in and out of traffic, breaking for green lights, smell of alcohol, or bloodshot or glassy eyes, to find a particularized suspicion justified King's question about alcohol. *Bramble,* ¶ 24. Larson's response, that he had a beer earlier in the day, was insufficient, without other articulable facts, to subject him to an FST search.

Larson complied with King's FST request. King's poor positioning of the on-board video makes it impossible to review Larson's FSTs, scored by an officer who concluded pre-stop he had "more than a careless driver." King expected Larson's PBT to be ".1 or more." (Tr. at 122.) King was wrong. He was surprised

with the .023 result. King knew the .023 PBT gave rise to the inference Larson was not impaired. (Tr. at 122); Mont. Code Ann. § 61-8-401(4)(a).

The district court misapprehended the evidence when it denied Larson's motion to suppress the FSTs based on a lack of particularized suspicion.

C. The District Court Erred; Larson's Lengthy Detention Exceeded the Scope of an Investigatory Stop and Subjected Him to *de facto* Custody.

If, *arguendo*, the stop and FST search are determined to be lawful, King's ensuing actions exceeded the scope of the stop and subjected Larson to an unlawful custodial interrogation and search following the .023 PBT reading. The court erroneously believed Larson (1) voluntarily admitted smoking marijuana earlier in the day, and (2) voluntarily retrieved marijuana before the deputies could issue a Consent to Search form. (D.C. Doc. 33.) On these two erroneous grounds, the district court ruled there was no interrogation warranting *Miranda* warnings, and no search requiring consent. (D.C. Doc. 33.)

A justified investigatory stop must be limited and reasonable. *Martinez*, ¶ 22, *citing Gopher*, 193 Mont. at 194, 631 P.2d at 296. It is "a temporary detention that 'may not last longer than is necessary to effectuate the purpose of the stop.'" *Martinez*, ¶ 27, *citing* Mont. Code Ann. § 46-5-403; *Terry*, 392 U.S. at 29. Its purpose is to allow for a "brief face-to-face exchange between the driver and a trained officer," occurring "within minutes and with minimal intrusion," and

its brevity is sufficient for a trained officer to determine whether probable cause exists for an arrest. *Martinez*, ¶ 38, *citing Hulse*, ¶ 40.

Some stops may be prolonged and take on an escalating quality justifying a longer detention. *State v. Meza*, 2006 MT 210, ¶ 23, 333 Mont. 305, 143 P.3d 422, *citing Hulse*, ¶ 40. However, the length of the stop here--two hours before *Miranda* warning, including forty-plus minutes at roadside--is beyond the bounds of any limited, reasonable, brief detention that should occur in minutes, with minimal intrusion. In his apparent zeal to garner his first DUI-drug arrest, King's detention of Larson exceeded the scope of an investigatory *Terry* stop and violated Larson's right to be free from unreasonable searches and seizures.

In analyzing the length of investigatory *Terry* stops, the United States Supreme Court has focused on the minimally intrusive nature of the seizure on an individual's Fourth Amendment interests. *United States v. Place*, 462 U.S. 696, 708-09 (1983). "[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion."[2] *Place*, 462 U.S. at 709. The Supreme Court has declined to adopt a bright line, outside time limit for a *Terry* stop, relying instead on a case-specific analysis. At some point, an investigative stop becomes a *de facto* arrest. *United States v. Sharpe*, 470 U.S.

[2] Reasonable grounds is equivalent to particularized suspicion. *Bush*, ¶ 10.

675, 685-86 (1985). The Supreme Court has examined whether police were required to detain a suspect while they "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." *Sharpe*, 470 U.S. at 686.

Concurring in the *Sharpe* decision, Justice Marshall observed the length of a stop may, in and of itself, be sufficiently intrusive to be unjustified in the absence of probable cause. "[A] stopping differs from an arrest not in the incompleteness of the seizure but in the brevity of it." *Sharpe*, 470 U.S. at 692, *citing* I.W. LaFave & J. Israel, *Criminal Procedure* § 3.8, p. 297 (1984). "Firm adherence to the requirement that stops be brief forces law enforcement officials to take into account from the start the serious and constitutionally protected liberty and privacy interests implicated in *Terry* stops and to alter official conduct accordingly." *Sharpe*, 470 U.S. at 693 (citation omitted).

Where a suspect's dilatory actions contributed twenty minutes of delay to a thirty to forty minute stop, the length of the stop was held to be reasonable. *Sharpe*, 470 U.S. at 688. Conversely, it is undisputed Larson was co-operative and did not engage in dilatory actions that prolonged his stop. (Tr. at 232.)

In *Place*, a ninety-minute seizure was too long and justified suppression of the evidence. *Place*, 462 U.S. at 709-10. Similarly, Larson's two-hour detention is

well beyond the ninety-minute prolonged seizure in *Place* that justified the suppression of evidence.

This Court has relied upon the brevity of an investigative stop to justify the intrusion. *State v. Elison*, 2000 MT 288, ¶¶ 30-32, 302 Mont. 228, 14 P.3d 456, (no entitlement to *Miranda* warning where officer asked a moderate number of questions, in a five to ten minute time span before making arrest). Unlike *Elison*, Larson was detained well beyond five to ten minutes.

A brief investigatory stop is just that--brief. Based on *Sharpe*, *Place*, and *Elison*, the brevity requirement was prolonged beyond any reasonable standard in Larson's case. He was in *de facto* custody.

1. Larson Was Subjected to Custodial Interrogation Following His .023 PBT Result.

Larson challenged probable cause to arrest pretrial; and the court erred in denying his motion. (D.C. Docs. 12, 33.) King and Schmill knew they did not have probable cause to arrest Larson following his .023 PBT. (Tr. at 122.) *See State v. Smith*, 1998 MT 94, ¶ 14, 288 Mont. 383, 958 P.2d 677 (PBT used to determine whether there is probable cause to arrest).

The protections of *Miranda* attach when an individual is subjected to custodial interrogation. *Elison*, ¶ 27; *Miranda v. Arizona*, 384 U.S. 436 (1966). The State may not use statements made by an individual during a custodial

interrogation if *Miranda* warnings were not given. *Elison*, ¶ 26, *citing Berkemer*, 468 U.S. at 428.

"People are 'in custody' for the purposes of *Miranda* if they have been deprived of their freedom of action in any significant way or their freedom of action has been curtailed to a degree associated with formal arrest." *Elison*, ¶ 27, *citing State v. Dawson*, 1999 MT 171, ¶ 30, 295 Mont. 212, 983 P.2d 916. "There are two separate components to the 'custodial interrogation' determination: (1) whether the individual was 'in custody' and (2) whether the individual was subjected to interrogation." *State v. Munson*, 2007 MT 222, ¶ 21, 339 Mont. 68, 169 P.3d 364, *citing Rhode Island v. Innis*, 446 U.S. 291, 299-301 (1980); *Illinois v. Perkins*, 496 U.S. 292, 297 (1990).

2. Larson Was in Custody.

The "in custody" analysis is a two-step inquiry: (1) the circumstances surrounding the interrogation, and (2) would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. *Munson,* ¶¶ 22-23 (citation omitted). Relevant circumstances include time and location, length and mood of questioning, including the use of coercive tactics and hostile tones of voice, presence of others, and whether the individual was confronted with evidence of guilt. *Munson*, ¶ 23 (citations omitted).

Larson was stopped after midnight. He was on the shoulder of a quiet side street, surrounded by two deputies, in two separate patrol cars, both in uniform, and both with weapons visible. Larson was subjected to an FST search and a PBT which, at .023, failed to provide probable cause for arrest. Instead of returning his papers and letting him go, the officers continued to detain Larson. They cornered him with a uniformed officer stationed close on each side. (St. Ex. C-3.) The officers questioned Larson in tandem, with one of them making points by counting off his fingers. Without audio, it should be inferred the officers were forceful, hostile, and coercive in their questioning. The officers failed to advise Larson of his *Miranda* rights and asked him incriminating questions about drugs. The officers told Larson they needed to search his truck. The officers failed to advise Larson of his right to refuse a search, allegedly because there was no time to do so.

The State has the burden of proving "by clear positive evidence that an individual freely and intelligently gave his unequivocal and specific consent to search, uncontaminated by any duress or coercion, actual or implied." *State v. Brough*, 171 Mont. 182, 185, 556 P.2d 1239, 1241 (1976) (citation omitted). The State cannot meet its burden.

The video shows King and Schmill had ample time to advise Larson of his rights before they engaged in any discussion following the PBT or discussed their "need" to search his truck for drugs. Additionally, King and Schmill had time to

follow Larson to his truck after they told him they needed to search it--they had time to advise Larson of his right of refusal. (St. Ex. C-3.) Larson submitted to the PBT at approximately time stamp 22:00. (St. Ex. C-3.) For the following several minutes, the deputies surrounded Larson in front of the patrol car, with his truck parked a distance ahead. The deputies talked with Larson about the "need" to search his truck, and Larson is viewed shaking his head "no" at times. Larson turns toward his truck, and is followed by the two deputies. By time stamp 25:48, the officers had positioned themselves on each side of the truck, shined their flashlights inside, and had even repositioned themselves for a better view. (St. Ex. C-3.) It simply defies common sense and logic that there was no opportunity for either deputy to *Mirandize* Larson or advise him of his right to refuse the stated "need" to search his truck. *Munson*, ¶ 51.

Like *Munson*, it was clear to Larson the officers were determined to obtain a DUI-drugs, and they were not going to let him go until they got what they wanted. *Munson*, ¶¶ 30-31. Unlike *Munson*, there is no audio for this Court to review to ascertain the dogged persistence of the officers. *See Munson*, ¶ 30, n.2 (one officer has testified it is "fairly common" to persist in trying to obtain consent to search after an individual has refused).

No reasonable person in Larson's position would have felt free to leave or terminate the questioning. In fact, when Larson turned away from the patrol car,

both officers followed him and surrounded the truck. Larson was in custody for the purposes of *Miranda*.

3. Larson Was Interrogated.

Under *Miranda*, interrogation "refers not only to express questioning, but also to 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Munson*, ¶¶ 25, 43 (citations omitted). It is the perceptions of the suspect, not the police, that determines whether an incriminating response was reasonably likely to be elicited. *Munson*, ¶ 25 (citations omitted).

The officers asked Larson express questions about drugs, which they should have known were reasonably likely to elicit an incriminating response. The officers told Larson they believed he had drugs in his truck, listed the reasons for their suspicions by emphasizing each reason on a separate finger, and told him they needed to search his truck. The officers' words and actions (failing to return his documents after the .023 PBT, cornering Larson in front of the patrol car, badgering him for information about drugs, telling him of the need to search his truck, following him to his truck, surrounding the truck, etc.) were reasonably likely to elicit an incriminating response. For purposes of *Miranda*, Larson was subjected to an interrogation.

Following the .023 PBT result, Larson was subjected to a custodial interrogation without being advised of his right to refuse the deputies' stated "need" to search his truck and without a *Miranda* advisement. He was interrogated in a custodial atmosphere and was entitled to the *Miranda* warnings. The district court erred in holding otherwise and must be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING LARSON'S COMPLETE JURY INSTRUCTION ON THE INFERENCE RESULTING FROM BLOOD TEST REFUSAL.

A. The State did not Object to Larson's Complete Instruction Incorporating the *Michaud* Holding.

Larson offered the following jury instruction as modified by *State v. Michaud*, be given at both the beginning and the end of trial. (Tr. at 193.) Larson's proffered instruction is referred herein to as the Complete Instruction.

> You are instructed that if a person under arrest for the offense of Operating a Motor Vehicle While Under the Influence of Alcohol and/or Drugs refuses to submit to a test which detects the presence of alcohol, drugs, or a combination of alcohol and drugs, proof of that refusal is admissible in a trial of that offense. You are permitted, but not required, to infer from the refusal that the Defendant was under the influence of alcohol or drugs. The inference is rebuttable.
>
> A test refusal does not, in itself, prove that the person was under the influence of alcohol or drugs at the time he was in control of a motor vehicle. A person may not be convicted based upon a refusal of a blood or breath test alone. The State must produce other competent evidence that the person was under the influence of alcohol or drugs while driving a motor vehicle. You must weigh the evidence presented and decide whether the State has proven beyond a

> reasonable doubt that the Defendant was under the influence of alcohol or drugs.

(App. G.) (Complete Instruction.)

The first paragraph of Larson's Complete Instruction (hereinafter, "Abbreviated Instruction") was discussed in *Michaud*. Larson argued that although the *Michaud* Court held it was not an abuse of discretion to give the Abbreviated Instruction, that holding was not controlling in his case. (Tr. at 195.) Larson contended the Complete Instruction was necessary as no other instruction addressed other competent evidence of impairment, and "[w]ithout that language we feel the trier of fact is not appropriately instructed as to the state of the current law." (Tr. at 193.) Restated, Larson asserted *Michaud* substantively changed the law by requiring other competent evidence of impairment in all cases where a test was refused and the statutory inference is at issue. (Tr. at 195, 325.)

The issue in *Michaud* was whether "the inference contained in § 61-8-404(2), MCA, whereby a jury may infer that a defendant was driving under the influence of alcohol from his refusal to take a sobriety test, violates a defendant's due process rights." *Michaud*, ¶ 42. The defendant in *Michaud* challenged the constitutionality of Mont. Code Ann. § 61-8-404(2) on several grounds, including that the inference shifted the State's burden of proof to the defendant, and denied him due process. *Michaud*, ¶¶ 44, 47. Michaud challenged the Abbreviated Instruction on constitutional grounds. *Michaud*, ¶¶ 44, 46. Although *Michaud* was

remanded on other grounds, his constitutional claims were addressed. *Michaud*, ¶ 43. In its resolution of the constitutional issues, this Court analyzed Mont. Code Ann. § 61-8-404 as a whole, and held it contained a permissive inference that required the trier of fact to be presented with other competent evidence of impairment. *Michaud*, ¶¶ 49, 53-54, *citing Morris*, ¶ 21 (corroborative evidence of DUI included testimony of erratic driving, slurred speech, red eyes, and odor of alcohol on breath and probable cause to arrest was not challenged).

The issue raised by Larson was not raised in either *Morris* or *Michaud*. Larson objected to the Abbreviate Instruction because it did not accurately state the law. There was no language in any other jury instruction regarding the State's burden to show impairment through other competent evidence, rather than on the inference alone. (5/8/09 Tr. at 79-81; 5/12/09 Tr. at 327-42.) The last instruction the jury heard before closing argument charged "The trier of fact may infer from the refusal that the person was under the influence. The inference is rebuttable." (5/12/09 Tr. at 342.) The jury received no instruction on the term "rebuttable," how it applied to any evidence it considered and weighed, how the State's burden of proof was not altered by the statutory inference, or how the State must show impairment by other competent and corroborating evidence.

Michaud was remanded on the grounds the court abused its discretion by admitting HGN evidence. *Michaud*, ¶ 41. Notably, the court gave the Complete

Instruction, not the Abbreviated Instruction, on the *Michaud* retrial. (Tr. at 186.) Moreover, the State did not object to Larson's Complete Instruction on the jury's duty not to convict solely on the refusal of a blood test, to require competent evidence to corroborate the statutory inference, and to weigh such evidence against the State's burden of proof. (Tr. at 186, 196.) Hence, the court erred and abused its discretion because the Abbreviated Instruction, in conjunction with the other instructions, failed to fully and fairly instruct the jury regarding the applicable law on the inference derived from Mont. Code Ann. § 61-8-404(2).

B. Larson Challenged Probable Cause; the *Michaud* Safeguard Against DUI Conviction Based Solely on Refusal to Take a Blood Test Failed.

Larson's case is further distinguished from *Morris* and *Michaud*. Larson challenged probable cause to arrest him. It is undisputed King observed no erratic driving, smelled no alcohol or marijuana, and observed no bloodshot or glassy eyes when he stopped Larson. Thus, Larson has not and does not concede there is evidence to establish probable cause that safeguarded him against the possibility of conviction based solely on his refusal to take a blood test. *Michaud*, ¶ 49. The *Michaud* safeguard failed Larson. The jury convicted him on the basis of the inference contained in Mont. Code Ann. § 61-8-404(2).

Regardless of whether Larson provided a blood sample, King predetermined he was going to charge Larson with DUI-drugs.

Q. So you--you told him that whether he provided a sample or not he's under arrest for DUI.

A. Correct.

(Tr. at 281.)

. . . .

Q. And then you say, *I'm going to charge you whether you provide a sample or not*.

A. Yes.

(Tr. at 282.)

The *Michaud* "safeguard" is an illusion in Larson's case. Those trained in legal analysis may understand the *Michaud* "safeguard" theory, but the law enforcement community and general public do not. It did not matter to King whether Larson submitted to a blood test. In King's mind, the blood test was irrelevant to his predetermination Larson was driving while impaired by marijuana. King not only communicated this to Larson when he requested the blood test, he communicated it to the jury in his opinion testimony. In King's mind, his arrest of Larson equated to proof of impairment. In Larson's case, the lack of probable cause to arrest did not protect him from conviction based on the statutory inference alone.

The *Michaud* "probable cause plus inference" safeguard failed Larson.

C. Deputy King Shifted the Burden to Larson: "*If you don't think you're impaired, why would you refuse?*"

Larson's contention the jury was not properly instructed is further supported by King's burden shifting at the detention center. King taunted Larson with his question: "*If you don't think you're impaired, why would you refuse*?" (Tr. at 281.)

> Q. You--asked him several times, you know, *If you don't think you're impaired, why would you refuse*? What was his answer?
>
> A. King. I don't recall exactly what his--

(Tr. at 281, emphasis in original; St. Ex. C-1.)

King's words and actions reveal a shocking misunderstanding of Larson's constitutional rights, including his right to be free from unreasonable searches and seizures. Absent probable cause, which Larson continues to challenge, King's request for a blood test was unlawful. King's repeated challenge to Larson "*If you don't think you're impaired, why would you refuse*?" exposes the disconnect between scholarly legal analysis and the thought processes of the police and general public. Too many fail to understand the police do not have the right to search on request. Too many believe the refusal of a police request means you are hiding something. That was King's mindset; it was communicated to the jury in the form of his lay opinion of marijuana impairment, and it was not corrected by

appropriate jury instructions. Such lay logic cannot stand the scrutiny of this Court.

The jury should have been given the Complete Instruction as offered by Larson, thereby ensuring the jury was properly instructed on the law and the context in which it should consider the permissive inference resulting from Larson's refusal. The court abused its discretion by failing to instruct the jury as requested by Larson, and failed to fully and fairly instruct the jury regarding its consideration of the permissive statutory inference in Mont. Code. Ann. § 61-8-404(2).

CONCLUSION

The case against Larson should be dismissed with prejudice, or alternatively, remanded for a new trial.

Respectfully submitted this ____ day of March, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

By: _____
EILEEN A. LARKIN
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

FRED R. VAN VALKENBURG
Missoula County Attorney
200 West Broadway
Missoula, MT 59802

JOSHUA LARSON
2009 40th Street
Missoula, MT 59806

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

EILEEN A. LARKIN

APPENDIX